

**UNITED STATES COURT OF APPEAL  
FOR THE TENTH CIRCUIT**

DISH NETWORK, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	<i>Electronically Filed</i>
	)	
NATIONAL LABOR RELATIONS BOARD	)	
and DAVID RABB, an Individual	)	
	)	
Respondent.	)	

**PETITION FOR REVIEW**

DISH Network, LLC, by and through its counsel, hereby petitions the court for review of the attached Decision and Order of the National Labor Relations Board entered on March 3, 2016.

Dated: March 18, 2016

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of March 2016, a true and correct copy of the  
**Petition for Review** was served on the following parties:

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Christian Antkowiak

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**Dish Network, LLC and David Rabb.** Case 27–CA–131084

March 3, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On March 26, 2015, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and

<sup>1</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent's maintenance of its "Solicitation in the Workplace" policy violated Sec. 8(a)(1) of the Act, we reject the Respondent's attempt to characterize its call center as a retail sales floor. See *Marshall Field & Co.*, 98 NLRB 88, 92 (1952) (employer may prohibit solicitation in the selling area of a retail store, but violated the Act by prohibiting all solicitation in all nonselling areas), enfd. as modified 200 F.2d 375 (7th Cir. 1952); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983) (retail store's ban on solicitation unlawfully overbroad where not limited to the selling floor). The Respondent's call center is not a retail establishment, nor is there a selling floor where customers are physically present.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by issuing a final warning to employee David Rabb for engaging in protected concerted activity, we reject the Respondent's argument that Rabb was disciplined for distribution rather than solicitation. The Respondent's written discipline form states that Rabb was witnessed soliciting his coworkers in violation of the provision in the Respondent's "Solicitation in the Workplace" policy that prohibits employees from engaging in solicitation in work areas during nonwork times unless authorized in advance by a vice president or higher. Although the policy also contains a provision that prohibits distribution of written materials, the written warning does not cite this provision.

In affirming the judge's finding, applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that Rabb was discharged for protected concerted activity in violation of Sec. 8(a)(1), we do not rely on the judge's citation to *Anco Insulations, Inc.*, 247 NLRB 612 (1980), for the definition of concerted activity. Instead, we rely on *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*),

affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

We agree with the judge, for the reasons he states, that the General Counsel sustained his initial burden of proving that Rabb's protected activity was a motivating factor in his discharge. In addition to the evidence of animus cited by the judge, we find that the Respondent's unlawful discipline of Rabb provides further evidence of its animus toward its employees' exercise of Sec. 7 rights. See, e.g., *Austal USA, LLC*, 356 NLRB 363, 363–364 (2010). Contrary to the suggestion of our concurring colleague, proving that an employee's protected activity was a motivating factor in the employer's adverse employment decision does not require the General Counsel to make some additional showing of particularized animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014); *TM Group, Inc.*, 357 NLRB 1186, 1186 fn. 2 (2011); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011). Although our colleague would find a nexus here, we emphasize that such a showing is not required.

We also agree with the judge's finding that the Respondent failed to show it would have terminated Rabb absent his protected activity. In this regard, we do not agree with our concurring colleague's suggestion that the judge improperly considered evidence related to the Respondent's intent in finding the Respondent failed to show it would have discharged Rabb even in the absence of his protected conduct. Under *Wright Line*, if the General Counsel sustains his initial burden, the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct. See *Wright Line*, 251 NLRB at 1089; see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983). Here, the judge considered the evidence offered by the Respondent, but properly found that it did not overcome the inference of discriminatory intent. We agree with this finding and note that the judge's analysis is consistent with longstanding precedent, beginning with *Wright Line* itself. See 251 NLRB at 1091 (finding respondent's defense undermined by evidence "suggest[ing] a predetermined plan to discover a reason to discharge [employee] and thus rid the facility of a union activist"); see also *NLRB v. Transportation Management Corp.*, 462 U.S. at 404–405 (evidence showing respondent "was obviously upset with [employee] for engaging in protected activity" supported Board's finding that respondent failed to show employee would not have been fired absent respondent's antiunion animus); *Hunter Douglas, Inc.*, 277 NLRB 1179, 1179, 1180 (1985) (reversing judge's finding that respondent demonstrated it would have laid off second-shift employees even in the absence of protected conduct because judge's analysis "fail[ed] to consider record evidence that demonstrates that the second shift was selected for layoff in order to defeat the union campaign," and plant manager's "undisputed desire to rid the second shift of its union sympathizers goes a long way in explaining how and why the second shift was eliminated in the manner in which it was"), enfd. 804 F.2d 808 (3d Cir. 1986).

Finally, the Respondent argues that the judge erred by treating its inside sales leads, also termed "coaches," as supervisors within the meaning of Sec. 2(11) of the Act. In its answer, the Respondent admitted complaint par. 3(a), which alleged that Barry Appelkans held the position of "Inside Sales Lead" and was a supervisor within the meaning of Sec. 2(11) of the Act and an agent of the Respondent within the meaning of Sec. 2(13). The Respondent never sought to amend its answer or contest the supervisory status of Barry Appelkans. Accordingly, we find the judge properly found that Coach Barry Appelkans was a super-

to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

### ORDER

The Respondent, Dish Network, LLC, Englewood, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a “Solicitation in the Workplace” policy in its employee handbook that prohibits employees from engaging in solicitation in work areas during nonwork time and requires management’s approval prior to engaging in such solicitation.

(b) Discharging, disciplining, or otherwise discriminating against employees because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the provision of the “Solicitation in the Workplace” policy in its employee handbook that prohibits employees from engaging in solicitation in work areas during nonwork time except as authorized in advance by a vice president or higher.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful provision has been rescinded, or (2) provide the language of a lawful provision; or publish and distribute a revised employee handbook that (1) does not contain the unlawful provision, or (2) provides the language of a lawful provision.

(c) Within 14 days from the date of this Order, offer David Rabb full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make David Rabb whole for any loss of earnings and other benefits suffered as a result of the discrimina-

tion against him, in the manner set forth in the remedy section of the judge’s decision.

(e) Compensate David Rabb for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful final warning and unlawful discharge of David Rabb, and within 3 days thereafter, notify David Rabb in writing that this has been done and that the final warning and discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post copies of the attached notice marked “Appendix A” at its Littleton, Colorado facility, and post copies of the attached notice marked “Appendix B” at all of its other facilities in the United States where the unlawful “Solicitation in the Workplace” policy is in effect or has been in effect at any time since December 18, 2013.<sup>3</sup> Copies of the notices, on forms provided by the Regional Director for Region 27, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked “Appendix A” to all current employees and former employees employed by the Respondent at its Little-

visor. See *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005). We find it unnecessary to decide whether the Respondent’s other unspecified coaches are also statutory supervisors. Because the record establishes both that employees looked to coaches to communicate the Respondent’s rules and expectations and that coaches indeed conveyed this information to inside sales associates on a routine and regular basis, we find that the Respondent’s coaches were its agents for purposes of transmitting management’s policies applicable to inside sales associates. See generally *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001).

<sup>2</sup> We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language and to clarify that the notice-posting remedy applies only to the Respondent’s facilities in the United States where the employee handbook containing the unlawful solicitation policy has been or is in effect. We will substitute new notices to conform to the Order as modified.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

ton, Colorado facility at any time since December 18, 2013. If the Respondent has gone out of business or closed any of its other facilities where the unlawful “Solicitation in the Workplace” policy was in effect on or after December 18, 2013, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked “Appendix B” to all former employees at that facility or those facilities employed since December 18, 2013.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 3, 2016

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

\_\_\_\_\_  
Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

I agree with the judge and my colleagues that the Respondent violated the Act by maintaining a solicitation policy that prohibited employees from engaging in solicitation during nonwork times unless authorized in advance by management. I also agree that the Respondent violated the Act by disciplining employee David Rabb for engaging in protected concerted activity—i.e., soliciting coworkers to join his lawsuit challenging certain policies of the Respondent that affected employees’ pay<sup>1</sup>—and by discharging Rabb for engaging in protected concerted activity. However, with respect to Rabb’s discharge, I believe that the judge misapplied the *Wright Line*<sup>2</sup> burden-shifting framework and failed to properly analyze the Respondent’s defense burden under *Wright Line*. My colleagues uphold the judge’s finding that the General Counsel satisfied his initial burden (*Wright Line* “stage one”), which pertains to unlawful motivation. However, the judge also relied on evidence of unlawful motivation to find that the Respondent failed to satisfy its

defense burden (*Wright Line* “stage two”). By doing so, the judge basically double-counted *Wright Line* stage one and eliminated *Wright Line* stage two. Because the Board and the courts must rely on *Wright Line* so frequently in cases that allege violations of Section 8(a)(3) and (1), it is important to apply that decision properly, as explained more fully below.

#### Background

The Respondent, Dish Network, LLC (the Respondent or Dish), provides satellite television and other media services nationwide. Charging Party David Rabb worked as an inside sales associate (ISA) at the Respondent’s Riverfront call center in Littleton, Colorado, from 2012 until he was fired on March 7, 2014. The Riverfront call center’s general manager was Emily Evans. David Gass, an inside sales manager, reported to Evans. Gass oversaw multiple inside sales leads, or “coaches.” Coaches supervised teams of up to 15 ISAs.

ISAs sell Dish’s services over the phone. They earn a base salary and commissions. ISAs receive a paid break period each shift, which they can take in increments of their choosing. ISAs use their computer to connect to calls and to switch into and out of various auxiliary modes corresponding to the activity they are engaged in at the time.<sup>3</sup> The system tracks the time ISAs spend in each auxiliary mode and generates a report for the Respondent. During a call, ISAs have two methods for placing a caller on hold. They can either switch the call into HOLD AUX, or they can place the caller on mute (also referred to as “silent hold”).<sup>4</sup> When an ISA places a caller on silent hold, a red light is illuminated above the ISA’s workstation. The red light is conspicuous and easily visible around the call center.

ISAs are expected to meet certain standards set forth in the Respondent’s Integrity Policy. Failure to do so results in a “Tier” violation, for which the Respondent imposes lost commission and discipline. Rabb had several coaches during his tenure at the Riverfront call center, including Barry Appelhans, who was his coach when he was fired. Rabb lost commission for Tier violations several times, and he complained to his coworkers and management about these deductions. In December 2013, he filed a complaint with the Colorado Department of Labor (DOL) regarding the Respondent’s commission structure.<sup>5</sup> Rabb discussed this complaint with coworkers. However, the record does not indicate that any of his

<sup>1</sup> In finding that Rabb was unlawfully disciplined for engaging in protected concerted activity, however, I do not rely on the judge’s citation to *Continental Group*, 357 NLRB 409 (2011).

<sup>2</sup> 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>3</sup> I.e., BREAK AUX, COACHING AUX, TRAINING AUX, AND HOLD AUX.

<sup>4</sup> Time spent on HOLD AUX is recorded and appears on monthly reports to management. Time spent on silent hold is not recorded.

<sup>5</sup> The Colorado DOL denied Rabb’s complaint on January 6, 2015, on jurisdictional grounds.

coworkers joined or assisted Rabb in filing the complaint. On January 30, 2014, Rabb and a coworker met with a private attorney regarding the Respondent's pay practices and a possible lawsuit. Thereafter, Rabb solicited about 15 coworkers to join this suit.

On February 19, 2014, Rabb was issued a written final warning for soliciting coworkers in violation of the Respondent's solicitation policy. Evans sought to terminate Rabb; however, Kristin D'Angelo, the Respondent's human resources manager, decided to place Rabb on a final warning. After Rabb received the final warning, he asked two supervisors for a former ISA's phone number. Evans again requested termination on the ground that Rabb breached the solicitation policy, but D'Angelo decided not to take any further action.

On March 4, 2014, Evans, Gass, and Appelkans were meeting in a conference room. Rabb's workstation was visible from the conference room, and Appelkans observed that Rabb left his desk and that his red silent-hold light was illuminated. Evans sent Gass to investigate. Gass was waiting at Rabb's workstation when Rabb returned from the restroom approximately 2 to 4 minutes later. Gass asked why Rabb had a customer on silent hold, and Rabb replied that he went to use the restroom. On March 7, Appelkans issued Rabb a written termination notification that referred to Rabb's use of silent hold on March 4.

Applying *Wright Line*, the judge found Rabb's employment termination unlawful. The judge found the General Counsel satisfied his initial *Wright Line* burden with evidence showing Rabb engaged in protected activity, the Respondent was aware of such activity, and the Respondent harbored animus toward that activity. The judge found animus based on Evans' twice seeking to fire Rabb for breaching the Respondent's solicitation policy, as well as the close timing between Rabb's "escalated protected activity" (his Colorado DOL complaint and soliciting coworkers to join his lawsuit) and his firing.

The judge further found the Respondent failed to establish its affirmative defense under *Wright Line*. The judge discussed six factors that, according to the judge, independently and collectively showed the Respondent would not have fired Rabb absent his protected activity.

(1) The judge found the Respondent's seizing on Rabb's longstanding practice of placing customers on silent hold to use the restroom only after Rabb engaged in protected activity undercut "any claim of evenhanded intent."

(2) The judge found that the lack of analogous disciplinary examples "suggest[ed] invidious intent."

(3) The judge stated the Respondent's decision to fire Rabb for using silent hold instead of BREAK AUX was "problematic."

(4) The judge found that the manner in which Evans and Gass detected Rabb's use of silent hold on March 4 suggested "invidious intent."

(5) The judge noted that Evans, who appeared "keenly motivated to remove Rabb," fired Rabb without asking his coaches whether they had accepted his conduct; according to the judge, the only plausible explanation for Evans' "malicious intent" was that Evans was retaliating against Rabb's protected activity.

(6) The judge concluded that the close timing between Rabb's firing and the escalation of his protected activity "further support[ed] discrimination."

#### Analysis

Because this is a mixed-motive case, it is appropriately evaluated under *Wright Line*, supra. To establish a violation of Section 8(a)(1) of the Act under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision."<sup>6</sup> This initial burden is sometimes referred to as *Wright Line* stage one. If the General Counsel makes that showing, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct."<sup>7</sup> This defense burden is sometimes referred to as *Wright Line* stage two. Significantly, the *Wright Line* burden-shifting approach is not appropriate in every case alleging unlawful discrimination. Rather, the *Wright Line* analysis applies only in "mixed-motive" cases (also sometimes called "dual-motive" cases), where it appears that unlawful considerations were a motivating factor in the discipline or discharge decision, but where the record supports the potential existence of one or more legitimate justifications for the decision.<sup>8</sup>

As an initial matter, I agree with my colleagues that the judge correctly found the General Counsel sustained his initial burden of establishing that Rabb's protected concerted activity was a motivating factor in his discharge.<sup>9</sup> The record reveals evidence of the Respond-

<sup>6</sup> *Wright Line*, 251 NLRB at 1089.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 1084 ("In [mixed-motive] cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. . . . This existence of both a 'good' and a 'bad' reason for the employer's action requires further inquiry into the role played by each motive.").

<sup>9</sup> *Wright Line* clearly requires the General Counsel to establish that unlawful considerations were a "motivating factor" in the disputed

ent's animus specifically toward Rabb's protected activity, including (i) disciplining Rabb in violation of Section 8(a)(1) for engaging in protected activity, (ii) Evans' twice seeking to fire Rabb for engaging in protected activity, and (iii) the close timing between Rabb's protected activity and his firing.<sup>10</sup> This evidence establishes the requisite motivational link between Rabb's protected activity and the Respondent's decision to discharge him.

decision, and generalized animus towards union activity is insufficient to satisfy this burden. See *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 10 (2015) (Member Miscimarra, dissenting); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 9 fn. 5 (2014) (Member Miscimarra, dissenting in part), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 fn. 1 (2014) (Member Miscimarra, concurring). However, a number of Board cases find that the General Counsel sustains his initial *Wright Line* burden by showing (1) union activity by employees, (2) employer knowledge of that activity, and (3) employer antiunion animus. E.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011). In my view, this formulation of the *Wright Line* stage-one burden is incorrect because the General Counsel "must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002); see also *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015) (holding that "there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker"); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554–555 (8th Cir. 2015) (denying enforcement of 361 NLRB No. 22 (2014) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive" (alterations and internal quotations omitted)).). The Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line*, 251 NLRB at 1089. In the instant case, however, I agree that the record supports a finding that unlawful considerations were a motivating factor in the decision to discharge Rabb, thereby satisfying the General Counsel's burden under *Wright Line* stage one.

<sup>10</sup> As I explained in my partial dissent in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 23–25 (2014), an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than the NLRA. Here, I would find that the Act's protection was triggered because Sec. 7's statutory requirements were met. First, two or more employees engaged in concerted activities: Rabb and a coworker met with an attorney together, and Rabb sought to induce other coworkers to join his lawsuit. Second, the concerted activities were for the purpose of mutual aid or protection because the lawsuit Rabb solicited his coworkers to join challenged the Respondent's pay practices. See *id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 13–17 (2014) (Member Miscimarra, concurring in part and dissenting in part). I would not rely on the judge's finding of "escalated" protected concerted activity, nor do I find it necessary to determine whether Rabb was engaged in protected concerted activity when he filed the Colorado DOL complaint.

Because the General Counsel met his initial burden under *Wright Line*, the burden shifted to the Respondent to prove it would have fired Rabb even absent his protected conduct. In the instant case, I believe the judge and my colleagues disregard this *Wright Line* stage-two burden. As noted above, the judge's *Wright Line* stage-two analysis primarily relied on evidence related to the Respondent's unlawful intent. There is a fundamental analytical problem with this approach. *Wright Line* applies *only* in "mixed-motive" cases, where the employer may have been motivated by lawful *and* unlawful considerations. If one relies on evidence of unlawful intent to find that the employer has failed to satisfy its burden under *Wright Line* stage two, this defeats the entire purpose of engaging in a *Wright Line* analysis, which is designed to help untangle cases in which there is evidence of unlawful *and* lawful motives. Stated differently, evidence of unlawful motivation is required to satisfy the General Counsel's *initial* burden (at *Wright Line* stage one), but the judge's approach would result in a violation even where the respondent *satisfied* its *Wright Line* burden at stage two. Again, the relevant question, when evaluating a *Wright Line* stage-two showing, is whether lawful reasons relied upon by the respondent would have resulted in the same discipline or discharge decision *even assuming the existence of unlawful motivation*.

The burden-shifting approach adopted in *Wright Line* provides "a formal framework within which . . . [the respondent may] establish its asserted legitimate justification."<sup>11</sup> Under this framework, the burden of establishing this legitimate justification comes into existence if, and only if, the General Counsel sustains his initial burden of showing the employee's protected conduct was a motivating factor in the employer's adverse employment decision. Even if the General Counsel sustains this burden, the *Wright Line* framework "permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense."<sup>12</sup> Under this framework, then, evidence of the employer's unlawful intent is properly considered at *Wright Line* stage one, when determining whether the General Counsel sustained his initial burden. However, evidence of unlawful intent is irrelevant to the question of whether the employer would have taken the same actions based on permissible considerations. By double-counting evidence of unlawful intent when analyzing the Respondent's defense burden, the judge improperly applied *Wright Line*'s

<sup>11</sup> 251 NLRB at 1089.

<sup>12</sup> *Transportation Management*, 462 U.S. at 400–401.

“formal framework” and gave inadequate consideration to the *Wright Line* stage-two analysis.

Here, based on the record evidence, and putting aside the Respondent’s unlawful motivation, I concur that the Respondent failed to show it would have fired Rabb for using silent hold. The record indicates that Rabb and other ISAs commonly used silent hold to take breaks during calls, and the Respondent’s coaches knew about this practice.<sup>13</sup> Rabb—whose testimony the judge found “highly credible” and “virtually un rebutted”—estimated he had used silent hold 1500 times prior to his termination, and he was not disciplined on these occasions. Rabb testified that he advised his coaches about his practice and used silent hold in their presence. Several other ISAs corroborated Rabb’s testimony. ISA Charles Welle testified that he placed callers on silent hold to go to the restroom or get a drink. Welle, ISA Raymond Best, and ISA Jonathan Hughes testified they frequently observed other ISAs using silent hold and leaving their workstations. Best and ISA Anne Tallman testified that their coaches had *instructed* them to use silent hold instead of HOLD AUX on calls.<sup>14</sup>

The Respondent introduced evidence of other ISAs who were discharged for conduct it claims was similar to Rabb’s, including two ISAs who were discharged for placing callers on silent hold and three ISAs who were terminated solely for once staying on a call without a customer for a short time. However, I agree that this evidence is insufficient to establish that the Respondent would have fired Rabb solely for using silent hold. As noted, the evidence shows that use of silent hold was commonplace and known to coaches. The Respondent failed to provide any evidence that other ISAs have been disciplined, much less discharged, for using silent hold a single time. The two ISAs discharged for placing a caller on silent hold were not comparable to Rabb because they also engaged in much more egregious conduct, including willfully giving misinformation to customers, creating false accounts, and insubordination. And unlike the use of silent hold, there is no evidence coaches knew about and condoned ISAs staying on a call without a customer.

Based on this evidence and a proper analysis under *Wright Line* stage two, I agree that the Respondent failed to establish that Rabb’s use of silent hold, standing alone, would have resulted in his discharge. Accordingly, I concur in the majority’s decision to affirm the judge’s

finding that Rabb’s employment termination violated the Act.

Dated, Washington, D.C. March 3, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

#### APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the provisions of the “Solicitation in the Workplace” policy in our employee handbook that prohibit employees from engaging in solicitation in work areas during nonwork time and require management’s approval prior to engaging in such solicitation.

WE WILL NOT discharge, discipline, or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the provisions of the “Solicitation in the Workplace” policy in our employee handbook that prohibit employees from engaging in solicitation in work areas during nonwork time and require management’s approval prior to engaging in such solicitation.

WE WILL furnish all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules, above, have been rescinded, or (2) provide the language of lawful rules; or WE WILL publish and distribute to all current employees at our facilities in the United States where the current em-

<sup>13</sup> I agree with the majority’s findings that Coach Barry Appelhans was a supervisor and the Respondent’s other coaches were its agents for purposes of transmitting management’s policies applicable to ISAs.

<sup>14</sup> The Respondent failed to call any of its coaches to rebut this testimony.

DISH NETWORK, LLC

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ployee handbook has been or is in effect a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

WE WILL, within 14 days from the date of the Board's Order, offer David Rabb full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Rabb whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate David Rabb for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful final warning and unlawful discharge of David Rabb, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the final warning and discharge will not be used against him in any way.

DISH NETWORK, LLC

The Board's decision can be found at – [www.nlrb.gov/case/27-CA-131084](http://www.nlrb.gov/case/27-CA-131084) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES

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WE WILL rescind the provisions of the "Solicitation in the Workplace" policy in our employee handbook that prohibit employees from engaging in solicitation in work areas during nonwork time and require management's approval prior to engaging in such solicitation.

WE WILL furnish all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules, above, have been rescinded, or (2) provide the language of lawful rules; or WE WILL publish and distribute to all current employees at our facilities in the United States where the current employee handbook has been or is in effect a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

DISH NETWORK, LLC

The Board's decision can be found at [www.nlrb.gov/case/27-CA-131084](http://www.nlrb.gov/case/27-CA-131084) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Todd Saveland, Esq.*, for the General Counsel.

*Brian D. Baloneck and Christian Antkowiak, Esqs. (Buchanan, Ingersoll & Rooney P.C.), for the Respondent.*

*David H. Miller and Rachel Graves, Esqs. (The Sawaya Law Firm)*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On January 6 and 7, 2015, this case was heard in Denver, Colorado. The complaint alleged that Dish Network, LLC (Dish or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) as follows: by issuing a final warning to, and later firing, David Rabb for engaging in protected concerted activities; and by maintaining an unlawful solicitation policy in its employee handbook.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

### FINDINGS OF FACT<sup>1</sup>

#### I. JURISDICTION

At all material times, Dish, a Colorado corporation, with a sales center in Littleton, Colorado (the Call Center), has provided satellite television and other media services. Annually, it purchases and receives at the Call Center goods valued in excess of \$50,000 directly from points located outside of Colorado. It, as a result, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Introduction

Inside sales associates (ISAs) sell television, internet, and telephone products over the phone. Over 1,000 ISAs work at the Call Center, which receives 2500 calls per day. The ISA slot is a high-turnover job, which has a 60-percent attrition rate, and average tenure of 12 months.

##### 1. Call Center hierarchy

Emily Evans is the General Manager. David Gass, an inside sales manager, reports to Evans. Gass oversees multiple coaches, who supervise 15-person, ISA teams.

##### 2. ISA—position description

ISAs earn a base salary and commissions. (GC Exhs. 3–4.) They are expected to meet a minimum closed sales rate.<sup>2</sup> Those ISAs, who work 8-hour shifts, receive paid, 30-minute breaks; whereas, those, who work 10-hour shifts, receive paid, 35-minute breaks.<sup>3</sup> In addition, ISAs receive unpaid, 1-hour meal breaks.

ISAs begin their shift by logging into their computers and

<sup>1</sup> Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

<sup>2</sup> The closed sale rate is the percentage of successful sales in relation to total calls.

<sup>3</sup> Breaks can be taken in any desired denominations, as long as the total cap is not exceeded.

transferring into READY AUX mode (i.e., call ready status).<sup>4</sup> Sales calls, on average, range from 15 and 30 minutes. Once a call ends, the system generally transfers a new call to the ISA.

ISAs repeatedly switch in and out of READY AUX, in order to signify their availability to receive customer calls. When taking unpaid meal breaks, ISAs log out of the system, and log in, upon their return. When taking paid breaks, ISAs place themselves in BREAK AUX. ISAs also place themselves into COACHING AUX, when receiving supervision, or TRAINING AUX, when receiving instruction. HOLD AUX temporarily plays music for holding customers. The system generates an AUX report, which tracks ISAs' performance metrics.<sup>5</sup> (GC Exh. 25.)

##### B. Integrity Policy—ISA Discipline and Commission Reductions

Dish has an Integrity Policy. It requires ISAs to meet certain ethical and professional standards during calls, and imposes lost commission and discipline for protocol breaches.

##### 1. Tier violations

The Integrity Policy divides call protocol breaches into these categories (Tier violations):

Category	Discipline	Examples
Tier 1	Up to termination	Lesser violations (e.g. not offering internet and delaying installation).
Tier 2	Up to termination	More serious violations (e.g. omitting disclosures and misinformation).
Tier 3	Termination Review	Egregious offenses (e.g. data misuse, payment without consent and profanity).
Auto-Fail	Discipline Review	Minor offenses (e.g. misreading disclosures and not offering DVR services).

(GC Exh. 5.)

##### 2. Incentive plan and charge back system

In January 2014,<sup>6</sup> Dish promulgated an incentive plan, which set forth a new bonus and payout schedule for successful sales. (GC Exh. 14.) Dish also retained the Integrity Policy, which resulted in ISAs' commissions being docked for committing Tier violations. (Id.)

##### 3. Detecting Tier violations

Dish uncovers its ISAs' Tier violations in several ways. Coaches, who use a wireless headset, monitor calls for Tier violations. A Quality Assurance Team (QA) also reviews two calls per ISA per week for Tier violations. Finally, a Sales Integrity Team (Sales Integrity) investigates ISAs, who are "red-flagged" (e.g., possess high cancellation rates).

<sup>4</sup> ISAs, periodically, attend a Coach-led, team meeting before entering READY AUX, if call volume permits.

<sup>5</sup> AUX usage does not affect an ISA's compensation, which is primarily based upon their sales metrics.

<sup>6</sup> All dates are in 2014, unless otherwise stated.

### C. Rabb's Tenure

Rabb, an ISA, worked at the Call Center from 2012 until his March 7 firing. He had several Coaches, including Barry Appelhans, his last supervisor. His wages were sporadically docked for Tier violations, which prompted his multiple workplace grievances.<sup>7</sup>

#### 1. Concerted complaints about Tier policy

##### a. Workplace complaints

Rabb repeatedly complained to his colleagues (i.e. many of whom shared his concerns), and management, about the Tier policy. On August 21, 2013, he emailed Senior Vice President Joe Clayton, and protested losing commissions and other matters. (GC Exh. 12). Evans recalled Rabb's complaints, even his audacious accusation that Dish was "stealing." (Tr. 336.)

##### b. Colorado Department of Labor

In or about December 2013 (i.e. 3 months before his firing), Rabb elevated his grievances beyond the workplace and filed a complaint with the Colorado Department of Labor (the DOL) concerning the Tier policy. He discussed this complaint with coworkers, Coach Appelhans and Sales Manager Gass. On January 6, the DOL denied the complaint as falling outside of its jurisdiction. (GC Exh. 13.)

##### c. Consideration of a Private Lawsuit

Rabb stated that, on January 30 (i.e., within 5 weeks of his firing), he and a colleague met with a private attorney regarding Dish's pay practices and discussed a possible lawsuit. He estimated that, thereafter, he solicited 15 coworkers to join this suit.

#### 2. February 18: Final Warning under Solicitation Policy

##### a. Solicitation Policy

The employee handbook provides as follows:

##### Solicitation in the Workplace

In the interest of maintaining a proper business environment and preventing interference with work and inconvenience to others, employees . . . may not distribute literature . . . of a personal nature by any means, . . . or solicit for any other reason during work time or in work areas except as specifically authorized in advance by a vice president or higher. Employees who are not on work time ([e.g.] . . . on lunch or break) may not solicit employees who are on work time.

(GC Exh. 17.) This policy is effective at the Call Center and multiple other sites. (Jt. Exh. 1.)

##### b. Final Warning

On February 18 (i.e., 3 weeks before his firing), Appelhans issued Rabb this warning:

On . . . February 18 . . . Rabb . . . solicit[ed] . . . co-workers to seek . . . an attorney. Soliciting employees . . . during work

time and in work areas is a clear violation of the . . . Solicitation in the Workplace [policy] in the Employee Handbook. . .

This disciplinary action is not being taken for discussing wages or terms and conditions of employment with coworkers, rather for violating company policy.

(GC Exh. 15.) Rabb admitted soliciting, but, averred that he did so during non-work time.<sup>8</sup>

Evans said that an employee complaint prompted this action against Rabb. (Tr. 337; GC Exh. 24.) She averred that she deemed this breach egregious, and boldly admitted that she sought Rabb's firing *solely* on this basis. (Tr. 372; GC Exh. 24.) She did not explain, however, why she considered this single breach of Dish's solicitation policy to be a terminable offense.

#### 3. March 7: termination

##### a. Termination Notification

On March 7, Coach Appelhans<sup>9</sup> issued Rabb this Termination Notification:

On . . . February 28, . . . Appelhans . . . passed . . . [Rabb] heading towards the bathroom and overheard [him] . . . telling another agent that he had just returned from lunch, but went in to coaching AUX to use the restroom. . . . [Appelhans] . . . informed [Rabb] . . . that he had logged him out of his computer . . . because he was using coaching AUX to go to the restroom, and . . . it is wrong to do so. . . . [Appelhans stated] that he should use . . . break time. . . .

Upon further investigation [Appelhans] . . . found other similar punches, each approximately 8 min long. . . . on . . . February 24 . . . and . . . 25. . . .

On . . . March 4, . . . Rabb had gotten up from his desk and walked away with a customer still on the line. Inside Sales Manager . . . Gass. . . . went to [Rabb's] desk and . . . could not find him. [Gass] . . . noted that [Rabb] . . . had a completed sale on his computer screen with an account number already generated . . . [Rabb] . . . returned a few minutes later to his desk where [Gass] . . . was sitting . . . [When Gass asked] why he had a customer on mute and was away from his desk [he] . . . . replied . . . I went to use the restroom. [Gass] . . . told him that he was outside of his break time and that he was not on lunch. . . .

(GC Exh. 18.)<sup>10</sup> Rabb replied, in writing, that, "[g]oing to restroom during sale-ongoing behavior—known to all four (4) coaches—no such counseling or verbal warnings." (Id.)

##### b. Rabb's assertions

Rabb explained that, on March 4, he successfully completed a credit check and asked his customer to hold for a few minutes, in order to afford him a window to generate an account number and complete paperwork. He testified that he

<sup>8</sup> He acknowledged that he might have solicited his coworkers on the work floor.

<sup>9</sup> Appelhans was terminated in August 2014.

<sup>10</sup> Appelhans did not testify; Dish also did not offer exhibits showing Rabb's February COACHING AUX usage.

<sup>7</sup> He estimated that he lost commissions for Tier violations on 20 occasions. See, e.g. (GC Exhs. 7–8; R. Exh. 18).

also went to the restroom during this period, and found Gass waiting for him when he returned. He said that he admitted his actions to Gass and completed the sale. He related that, after a successful credit check, he frequently placed customers on hold to use the restroom or take a short break.<sup>11</sup> He noted that he repeatedly advised Coaches Appelhans, Tepu Manowar, Eric Robb and Peter Schmidt about this practice, without consequence.<sup>12</sup> He stated that he never summoned management to aid him and was astonished, when Gass sought him out. He thought that Gass' behavior was unusual, inasmuch as he became irate over what had previously been commonplace. He related that he never previously used BREAK AUX to use the restroom. He, instead, averred that he used COACHING AUX, or silent hold, for such breaks. He estimated that a round trip to the restroom was only 3 minutes, and that calls ranged from 15 to 90 minutes. He added that his telephone featured two hold options: HOLD AUX, which played music; and silent hold. He noted that he was previously told by Coaches not to use HOLD AUX. He stated that Appelhans was seated diagonally across from his work station, and that his actions were transparent.

Raymond Best, a former ISA,<sup>13</sup> testified that he was supervised by Appelhans and was also a member of Rabb's team. He related that, while on another team, Coach Robb directed him to use silent hold for customers because HOLD AUX usage would reflect poorly on his AUX statistics.<sup>14</sup> He stated that, once assigned to Appelhans' team, he continued to use silent hold during calls, and that Appelhans observed him do so repeatedly.

Ann Tallman, a former ISA,<sup>15</sup> stated that, in 2013, she reported to Appelhans. She stated that she repeatedly used silent hold to: take short breaks; consult with Coaches; or use the restroom. She described Dish's direction regarding this issue as ambiguous.

Charles Welle, an ISA,<sup>16</sup> stated that he has been supervised by various Coaches, including Appelhans, and was also on a team with Rabb. He stated that he used silent hold for many reasons, including: clearing his throat; asking a question; using the restroom; or getting a drink. (Tr. 241.) He said that Appelhans knew about these practices and noted that the red silent hold light that illuminated on his phone was conspicuous. He stated that he continues to use silent hold to use the restroom. He said that, when he walks around the Call Center, he repeatedly observes red silent hold lights illuminated. He said that he never left his phone on silent hold, and returned to find supervision awaiting. He stated that, beyond Rabb, he has never heard of someone being disciplined for placing a customer

on silent hold.

#### *c. Dish's stance*

Evans stated that, while meeting in a conference room with Gass, Appelhans and Floor Manager Sean Ayers, Rabb was observed arising from his desk. She stated that they grew worried that he needed their help, and Gass was dispatched. She added that Appelhans was not sent because he was in the midst of a discussion. She related that, because the conference room was 15 feet from Rabb's desk, they were able to see his phone's red light illuminated.<sup>17</sup> She stated that Gass learned that Rabb had left a customer on silent hold at the end of a transaction in order to use the restroom, which she deemed to be a serious breach.<sup>18</sup> She stated that he should have finished the call and then used BREAK AUX. See (R. Exh. 22). She noted that Rabb was previously told not to use COACHING AUX for restroom breaks by Appelhans and considered this situation to be analogous. See (R. Exh. 23). She explained that Dish has repeatedly told ISAs that excessive silent hold usage was prohibited.<sup>19</sup> (GC Exh. 19; R. Exhs. 15, 27–28.) She averred that, on this basis, she concluded that termination was warranted. She averred that his Final Warning for solicitation was a non-factor in his termination decision, even though she contradictorily sought his firing at that time as well. She inexplicably stated that, although she knew that Rabb claimed that his Coaches accepted his restroom practices, she never investigated this matter. (Tr. 357–358.)

Gass testified that Appelhans saw Rabb leave his desk, while a caller was on hold, and he was sent to investigate. He estimated that Rabb had less than a minute of work remaining, when he left the call. He said that, when Rabb returned, he admitted that he went to use the restroom.

Jonathan Hughes, an ISA, averred that ISAs cannot place a customer on silent hold to use the restroom. In spite of this contention, he agreed, however, that he has routinely seen ISAs use silent hold and leave their workstations. He added that he utilizes BREAK AUX to go to the restroom, although his AUX usage exceeded his allotment by 47 percent.<sup>20</sup> See (GC Exh. 25.) Kenneth Paris, an ISA, posited that placing a customer on silent hold was not suitable for restroom breaks. Ironically, his BREAK AUX usage was a whopping 121 percent above the reported 35-minute allotment.<sup>21</sup> (Id.)

#### *d. Related Call Center Discipline*

This chart summarizes Termination Notifications issued at the Call Center for what Dish globally classified as "call avoidance" issues, which were akin to Rabb's transgression:

<sup>11</sup> He estimated that, of his roughly 3000 sales, he engaged in this practice 1500 times, without discipline.

<sup>12</sup> He explained that he openly stated to them that he was "generating an account number," which was his "code" for a restroom break. He said that they understood his intentions, and made no effort to ban this practice.

<sup>13</sup> He was employed at the Call Center from July 2013, through April 2014.

<sup>14</sup> Robb was, without explanation, never called to rebut this matter.

<sup>15</sup> She was employed at the Call Center from April 2011, through January 2014.

<sup>16</sup> He has been employed at the Call Center since January 2012.

<sup>17</sup> Rabb's desk was elevated due to an accommodation, which further facilitated the observation of this light.

<sup>18</sup> Evans stated that silent hold should be limited to short questions for Coaches, sneezes or coughs, or for quick account reviews. She noted silent hold usage is subject to abuse, and considers it a way to avoid calls.

<sup>19</sup> Evans said that this policy was announced at team meetings and orientation, and posted on a bulletin board.

<sup>20</sup> No evidence was presented, which demonstrated that he was disciplined for exceeding the BREAK AUX cap.

<sup>21</sup> No evidence was presented, which demonstrated that he was disciplined for exceeding the BREAK AUX cap.

Date	Employee	Summary of Discharge Events
Jan. 2012	B. Jones	Lingering in a customer's voicemail for over 40 minutes, and using profanity in the workplace (caught by QA or Sales Integrity)
Dec. 2012	C. Luckner	Call avoidance, placing customer on unnecessary silent hold on 8 occasions ranging from 5 to 15 minutes each, willful misinformation to customers on 4 occasions regarding equipment and pricing, and creating false account (caught by Sales Integrity).
Jan. 2013	L. Lewnard	Placing customers on unnecessary holds, repeatedly and hostilely telling a supervisor while pointing a finger that he didn't have to listen to him, and double the amount of approved break time (caught by Call Center Management).
Mar. 2013	J. Behm	Staying on a call without a customer for 36 minutes (caught by QA).
Date	Employee	Summary of Discharge Events
Aug. 2013	P. Williams	Staying on a call without a customer for 10 minutes (caught by Sales Integrity).
Aug. 2013	S. Bissell	Staying on a call without a customer for 6 minutes (caught by QA or Sales Integrity).
Aug. 2013	J. Brown	Call avoidance on 8 occasions over 5 days by calling an outbound number without a customer on the other end and lingering for several minutes each time (caught by QA).
Sep. 2013	K. Baasch	Staying on a call without a customer for 6 minutes (caught by Sales Integrity).
Dec. 2013	E. Nielsen	Placing 30 calls to same number, without leaving a message (caught by QA).
Sep. 2014	K. Warwick	Staying on a call without a customer for 49 minutes (caught by QA)

(R. Exhs. 5–14; Tr. 372–375).

#### *e. Findings*

Although most of the relevant facts are undisputed, several key matters remain contested, and require a credibility resolution. These issues regard: Rabb's past practice of using silent hold for restroom breaks; his Coaches' awareness and acceptance of this practice; other ISAs' practices regarding silent hold usage and managerial knowledge; and whether Evans and Gass were acting in good faith when they reportedly aided Rabb.

#### (i.) Rabb's Silent hold practices and management's awareness

Rabb's testimony that, prior to his firing, he openly and routinely used silent hold for restroom breaks with his Coaches' knowledge, and without disciplinary consequence, was highly credible. As a threshold matter, he had a stellar demeanor; he was forthright, reliable, and consistent on direct and cross. Dish also failed to produce a single Coach to counter his testimony on this point.<sup>22</sup> It is also probable that, if Rabb routinely placed customers on silent hold, Dish would have responded vastly earlier in his tenure, if such actions were genuinely prohibited.<sup>23</sup> Moreover, Rabb's contention that his silent hold practices were tolerated was corroborated by other witnesses. Tallman and Welle, who possessed highly credible demeanors, stated that they use silent hold to use the restroom, have consistently observed other ISAs use silent hold for a range of reasons, and routinely observe a mosaic of illuminated hold lights at the Call Center.<sup>24</sup> Moreover, although Hughes and Paris both testified that they thought it was prohibited to use the silent hold for restroom breaks, they nevertheless agreed that they have repeatedly observed other ISAs using silent hold. I find, as a result, that while Dish has a rule prohibiting excessive silent hold usage, its enforcement of this rule is, at best, listless. Consequently, Rabb and many others, with the tacit approval of their Coaches, routinely placed callers on silent hold to use the restroom or for an array of other reasons. Finally, the conspicuous lack of discipline regarding silent hold usage further demonstrates Dish's evisceration of its own rule.

#### (ii.) Good faith

Contrary to Evans' and Gass' contentions to the contrary, the record does not demonstrate that they benevolently sought to assist Rabb before his termination, only to unwittingly uncover his alleged duplicity. I find, instead, that they placed Rabb under close scrutiny as a result of his complaints about Dish's pay practices, and seized upon his longstanding restroom practices, as a mechanism to jettison a perceived malcontent. *First*, I found Evans and Gass to be wholly unbelievable witnesses, who appeared keenly focused on advancing their case, at the expense of offering truthful testimony.<sup>25</sup> *Second*, I find it implausible that management would have spontaneously withdrawn from a closed door meeting to assist an ISA, who was not obviously seeking assistance. Moreover, if Rabb, who is

<sup>22</sup> Given that Appelans was fired by Dish, an adverse inference is not being drawn. See *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 fn. 1 (1993). The same can be said for the other Coaches, inasmuch as the record fails to demonstrate whether they remain employed by Dish. Dish's failure to present these witnesses, however, resulted in Rabb's contention on this point being virtually un rebutted, and, consequently, afforded considerable weight.

<sup>23</sup> Rabb's usage of silent hold on approximately 1500 other occasions was wholly un rebutted.

<sup>24</sup> Best, who also possessed a credible demeanor, credibly stated that he observed other ISAs place callers on silent hold, by virtue of the numerous red lights that he saw illuminated.

<sup>25</sup> They were also inconsistent on a key point, with Evans stating that she sent Gass to aid Rabb because she was talking to Appelans, and Gass contradictorily stating that Evans sent him because he was closest to the door.

quite outspoken, required assistance, his request would have been unmistakable. *Third*, if Gass truly wanted to help Rabb, he would have, instead, located him, instead of waiting at his desk. *Fourth*, if Evans truly had benevolent intentions regarding Rabb, she would not have previously sought his termination for a minor breach of her unlawful solicitation rule. *Fifth*, it is equally implausible that Evans would have dispatched Gass to aid Rabb, when Appelhaus, his Coach and Gass' subordinate, was available. *Finally*, Evans' good faith is also incredible, given that she failed to even ask his Coach whether his silent hold usage was routine and accepted.

#### 4. Statistics on AUX usage

An exhibit was proffered, which summarized ISAs' BREAK AUX usage at the Call Center from March 2013 to June 2014. (GC Exh. 25.) During this period, ISAs used 106 percent of their BREAK AUX allotment.<sup>26</sup> One ISA, Sarah Story, used 214.47 percent of her BREAK AUX allotment.<sup>27</sup> Another ISA, Paul Blankly, used 121 percent of his allotment.<sup>28</sup> Simply put, multiple ISAs exceeded their Break AUX cap and remain gainfully employed.<sup>29</sup> Evans conceded that some ISAs exceed their break time, and, surprisingly, described this scenario as "common," even though this scenario is akin to the call avoidance breach that was offered as the basis for Rabb's firing. (Tr. 302.)

#### D. Lawsuit

On July 25, 2014, Rabb and others filed a lawsuit against Dish. (GC Exh. 21.) The complaint challenged the Tier policy and alleged violations of Colorado's Wage and Hour Law.

### III. ANALYSIS

#### A. Solicitation Policy

The *Solicitation in the Workplace* policy is unlawful.<sup>30</sup> In determining whether the maintenance of a work rule violates Section 8(a)(1), the appropriate inquiry is whether it reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The Board has, consequently, held that, "an employer may not generally prohibit union solicitation ... during nonworking times or in nonworking areas." *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Although employers can generally ban solicitation in working areas during working time, such bans cannot extend to working areas during nonworking time. *Food Services of America, Inc.*, 360 NLRB No. 123, slip op. at 7 (2014). It is also generally verboten to require employees to obtain managerial approval prior to engaging in Section 7 activity. *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

The *Solicitation in the Workplace* policy is unlawful. Its

<sup>26</sup> Out of the 48 ISAs listed, 21 exceeded their BREAK AUX allotment (i.e., 44 percent).

<sup>27</sup> Story was ultimately terminated, although the record fails to describe the basis.

<sup>28</sup> ISA Blankly remains employed.

<sup>29</sup> ISAs Chaney, Hughes, Paris and Pearce provide examples. (Tr. 386.)

<sup>30</sup> This allegation is listed under complaint pars. 4 and 6.

blanket prohibition of all work area solicitations, including those work area solicitations that occur during nonwork time, is unlawful. *Food Services of America, Inc.*, *supra*. This policy also unlawfully requires obtaining management's approval before embarking on such solicitations. *Brunswick Corp.*, *supra*.

#### B. Rabb's Final Written Warning and Termination

Dish unlawfully issued a final warning to, and subsequently discharged, Rabb. The complaint alleged that these actions violated Section 8(a)(1).<sup>31</sup>

##### 1. Protected activity

Rabb, clearly, engaged in protected concerted activity. The Board has held that activity is concerted, when an individual's grievance is a logical outgrowth of group concerns. *Amelio's*, 301 NLRB 182 (1991). The Board has, accordingly, found that "ostensibly individual activity may ... be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees."<sup>32</sup> *Anco Insulations, Inc.*, 247 NLRB 612 (1980). The Board has, thus, found that an individual's solicitation of their coworkers to join a wage and hour suit against their employer is protected concerted activity. See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 6 (2014); *Host International*, 290 NLRB 442, 443 (1988). In the instant case, Rabb repeatedly complained about wage policy and solicited coworkers to join his connected suit. He filed a complaint with the DOL concerning such policy, and was named as a plaintiff in the resulting action. Dish, in its brief, conceded that he engaged in protected activity.

##### 2. February 18, 2014: final warning

Rabb's Final Warning violated the Act. The Board has held that discipline imposed pursuant to an unlawful rule is invalid under the following circumstances:

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. ... It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of dis-

<sup>31</sup> These allegations are listed under pars. 5 and 6 of the complaint.

<sup>32</sup> See also *The Loft*, 277 NLRB 1444, 465 (1986) (single employee's complaint about employer's handling of problem is concerted activity); *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979).

cipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.

*Continental Group, Inc.*, 357 NLRB 409, 412 (2011) (citations omitted).

Rabb received discipline under the unlawful *Solicitation in the Workplace* policy for engaging in protected concerted activity (i.e. soliciting coworkers to join his lawsuit challenging wage policy). Dish made no showing that his activities interfered with his own work, the work of others, or Call Center operations. His final warning was, accordingly, unlawful.

### 3. March 7, 2014: termination

Rabb's termination was unlawful. In assessing whether a discharge is unlawful, the Board applies a mixed motive analysis, which is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

#### a. Prima facie case

The General Counsel made a prima facie *Wright Line* showing. As noted, Rabb engaged in protected activity, which Dish was admittedly aware of. Evans bore animus against such activity, when she sought his firing for breaching the solicitation policy. Animus is also shown by the close timing between Rabb's escalated protected activity (i.e., filing a DOL complaint and soliciting workers to join his lawsuit) and his firing, which all occurred within 3 months. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed.Appx. 441 (5th Cir. 2003).

#### b. Affirmative defense

Dish failed to show that it would have terminated Rabb, absent his protected activity. *First*, he had a longstanding practice of placing customers on silent hold to use the restroom, which was tacitly accepted by his Coaches. Dish's seizure upon this long-term practice as disciplinary fodder, only after he engaged in protected activity, deeply undercuts any claim of evenhanded

intent.<sup>33</sup> *Second*, Dish's conspicuous lack of analogous disciplinary examples suggests invidious intent (i.e. the clear absence of discharges for placing callers on silent hold).<sup>34</sup> *Third*, given that other ISAs routinely exceed their BREAK AUX allotment without disciplinary consequences, Dish's decision to fire Rabb for using silent hold to use the restroom instead of BREAK AUX is problematic.<sup>35</sup> See (GC Exh. 25). *Fourth*, the methodology that Dish used to trap Rabb suggests invidious intent. Evans and Gass misrepresented their intentions about trying to benevolently aid him, and, instead, sought to ensnare him. *Fifth*, if Dish's intentions were truly evenhanded, it would have responded less drastically to someone using the restroom.<sup>36</sup> Moreover, Evans fired him, without even taking the very obvious and fair step of asking his Coaches whether they had accepted his conduct. She also sought to fire him twice before the March 8 incident for solely breaching the solicitation policy. Evans, as a result, appears to have been keenly motivated to remove Rabb; the only plausible explanation for this malicious intent was retaliation for his protected activity. *Lastly*, as noted, the close timing between his firing and escalation of his protected activity further supports discrimination. In sum, the above-described factors independently, and collectively, show that Dish would not have fired Rabb, absent his protected activity.

### CONCLUSIONS OF LAW

1. Dish is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Dish violated Section 8(a)(1) of the Act by maintaining a *Solicitation in the Workplace* policy in its Employee Handbook, which banned solicitation in working areas during nonworking time, and required management's approval prior to such solicitations.

3. Dish violated Section 8(a)(1) of the Act by issuing Rabb a final warning, and later discharging him, because he engaged in protected concerted activities.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

### REMEDY

Having found that Dish committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative

<sup>33</sup> Moreover, if Rabb's actions were truly verboten, Dish would address the multitude of ISAs, who continue to use silent hold.

<sup>34</sup> Although Dish offered Luckner and Lewnard as examples, these individuals also engaged in gross insubordination, lied and created false accounts. Dish did not provide any records, however, which demonstrated an ISA, other than Rabb, being fired for *solely* placing a caller on silent hold. Given that the record reveals that this activity is somewhat rampant at the Call Center, this lack of discipline renders Rabb's firing dubious.

<sup>35</sup> Or put another way, if Dish were truly concerned with ISAs avoiding their calls, it would also respond to the multitude of ISAs, who exceed their BREAK AUX allotment.

<sup>36</sup> It is plausible that a reasonable employer would have first warned Rabb, who was a somewhat long term ISA holding a job where most leave after only a year, instead of firing him. The decision to sever all ties, and then expend resources hiring and training a new ISA, instead of first attempting rehabilitation is unconvincing.

action designed to effectuate the policies of the Act. Given that its policy is maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities where the unlawful policy has been, or is, in effect.<sup>37</sup> See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark LLC*, 344 NLRB 809, 812 (2005). Its duty to rescind or modify the unlawful policy is governed by *Guardsmark LLC*, supra.<sup>38</sup>

Dish, having unlawfully discharged Rabb, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the date of his discharge to proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Dish shall expunge from its records any references to his final warning and discharge, provide written notice of such expunction, and inform him that its unlawful conduct will not be used against him as a basis for future actions. Respondent shall compensate Rabb for any adverse tax consequences tied to receiving a lump-sum backpay award, and file a report with the Social Security Administration, which allocates this award to the appropriate calendar quarter(s). *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Dish shall nationally distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>39</sup>

#### ORDER

Dish Network, LLC, Englewood, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a *Solicitation in the Workplace* policy in its employee handbook, which bans solicitation occurring in working areas during nonworking time, and requires management's approval prior to engaging in such solicitations.

<sup>37</sup> This policy is maintained nationally at over 100 locations. See (Jt. Exh. 1).

<sup>38</sup> "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark*, supra at 812 fn. 8.

<sup>39</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Issuing employees final warnings, terminations or other discipline because its employees have engaged in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify the language in the *Solicitation in the Workplace* policy to the extent that it prohibited employee solicitation occurring in working areas during nonworking time, and required management's approval prior to engaging in solicitation.

(b) Furnish all current employees with inserts for the employee handbook that

1. Advise that the unlawful rule has been rescinded, or

2. Provide the language of lawful rule or publish and distribute a revised Employee Handbook that

i. Provides the language of lawful rule.

ii. Within 14 days from the date of the Board's Order, offer David Rabb his former job or, if such job no longer exists, offer him a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make David Rabb whole for any loss of earnings and benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section above.

(e) Compensate Rabb for any adverse tax consequences tied to receiving a lump-sum backpay award, and file a report with the Social Security Administration, which allocates the backpay award to the appropriate calendar quarter(s).

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to David Rabb's unlawful final warning and discharge, and within 3 days thereafter notify him in writing that this has been done and that his discipline will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(h) Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Handbook is in effect, copies of the attached notice, marked "Appendix."<sup>40</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

<sup>40</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DISH NETWORK, LLC

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spicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed it at any time since December 18, 2013.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. March 26, 2015

#### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain provisions in our Employee Handbook, which prohibit employees from soliciting in work areas during nonwork time, and require management's approval before soliciting.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you collectively complain about, or file a lawsuit concerning, the Integrity System, Tier violation policy, lost commissions or pay practices, or engage in other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify the language of the *Solicitation in the Workplace* policy in our Employee Handbook to the extent that it prohibits employee solicitation occurring in working areas during nonworking time, and requires management's approval prior to soliciting.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provision, above has been rescinded, or

2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:

- a. Do not contain the unlawful provision, or
- b. Provide the language of a lawful provision.

WE WILL, within 14 days from the date of this Order, offer David Rabb full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Rabb whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to David Rabb's unlawful final warning and discharge.

WE WILL, within 3 days thereafter, notify David Rabb in writing that this has been done and that the final warning and discharge will not be used against him in any way.

WE WILL compensate Rabb for any adverse tax consequences tied to receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration, which allocates this award to the appropriate calendar quarter(s).

DISH NETWORK, LLC